REDACTED VERSION

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
(Independent Spent Fuel Storage Installation)	)	

CLI-05-01

MEMORANDUM AND ORDER
(Original Version Contains Proprietary Information)

Today we address numerous issues related to the disclosure or redaction of certain evidentiary and decisional material to which the Atomic Safety and Licensing Board referred in four as-yet-unpublished Memoranda and Orders in this independent spent fuel storage installation (ISFSI) licensing proceeding. Many of these issues reach us by way of cross-petitions for review of a March 31, 2004 Memorandum and Order (March 31st Order). In that order, the Board addressed various requests for either disclosure or redaction of certain financially-related information contained in the four prior orders of the Board. Similar issues stem from our own request that the parties indicate what information they believe we should redact from CLI-04-10 (an as-yet-unpublished Commission order accepting for review certain issues involving financial assurance).

REDACTED VERSION

Private Fuel Storage (PFS), in its Petition for Review, challenges the Board's decision not to withhold what PFS considers proprietary information concerning a settlement agreement between PFS and former intervenors Castle Rock Land and Livestock Company, L.C., Skull Valley Company, Ltd., and Ensign Ranches of Utah, L.C. (collectively Castle Rock). PFS also appeals the Board's refusal to withhold what PFS considers confidential information concerning PFS's Model Service Agreement (MSA), under which PFS would pass through all its construction, operating, maintenance, and decommissioning costs to its storage customers.[1] And last, PFS seeks Commission approval for additional redactions which PFS had not requested from the Board during the hearing.

The State of Utah opposes PFS's position on three grounds: PFS has failed to show competitive harm from disclosure; the requested redactions would distort the bases and effects of the underlying reasons upon which the Board and Commission relied in finding PFS financially qualified; and PFS's latest requests for redaction are untimely. In addition, Utah has filed its own Petition for Review in which it asks us to reverse every one of the Board's rulings granting redaction of information contained in the Board's four decisions. Utah and PFS have, between them, placed virtually the entire March 31st Order before us on appeal. Utah also seeks disclosure of similar information from various parts of the administrative record.

Finally, we have before us the parties' arguments as to what portions of CLI-04-10 (March 24, 2004) should be redacted prior to that order's release to the public. The parties' positions regarding redactions from CLI-04-10 echo their views concerning redactions from the Board's four orders.

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[1] *See* March 31st Order at 29-31.

Today, we affirm in part and reverse in part the Board's March 31st Order, and we rule on the disclosure or redaction of various kinds of information in the record and in the Board's and Commission's decisions. We also require PFS to prepare redacted versions of those documents, consistent with the rulings in the instant order. Finally, we provide for Board and Commission review of those versions, to ensure such consistency.

I. PROCEDURAL BACKGROUND

On March 31, 2004, the Board issued an order ruling both on Utah's two requests for disclosure of evidentiary materials[2] related to the "Financial Assurance" contentions (Utah E / Confederated Tribes F), and also on all parties' arguments regarding redaction of portions of four as-yet-unpublished Board Memoranda and Orders involving both the "Financial Assurance" contentions and the "Decommissioning" contention (Utah S).[3]

The Board addressed these requests and arguments by applying 10 C.F.R. § 2.790(a)(4), which provides that the agency will withhold from the public "commercial or financial information obtained from a person and privileged or confidential," and 10 C.F.R.

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[2] The materials are hearing transcripts, exhibits, pre-filed testimony and cross-examination plans. *See* unpublished Memorandum, "Notice Regarding Issuance of Decision," dated April 30, 2004, at 1-2.

[3] The Board issued three of these orders on May 27, 2003, and the fourth on January 5, 2004. To avoid confusion, we will refer to the three May 27th orders as follows:

Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Relating to Remand from CLI-00-13 [52 NRC 23 (2000)])	"MSA Order"
Partial Initial Decision (Contention Utah E / Confederated Tribes F, Financial Assurance)	"Financial Assurance Order"
Partial Initial Decision (Contention Utah S, Decommissioning)	"Decommis-sioning Order"

§ 2.790(b)(4), which sets forth five factors to consider in making such a determination. As for the information that the Board found "privileged or confidential," the Board then, under section 2.790(b)(5), balanced "the right of the public to be fully apprised as to the bases for and effects of [PFS's] proposed action" against "the demonstrated concern for protection of a competitive position." The Board redacted part of the evidentiary and decisional material at issue.

On April 15th, both PFS and Utah sought our review of the Board's March 31st order. On June 9th, we issued CLI-04-16 granting the two petitions and permitting the parties to file supplemental briefs.[4]

II. APPLICABLE LEGAL STANDARD

PFS seeks nondisclosure of various pieces of information on the ground that they constitute proprietary commercial information whose public release would harm PFS's competitive position. PFS relies on section 2.790 of our procedural regulations, which sets forth the standards for withholding information from the public in proceedings (such as this one) adjudicated under 10 C.F.R. Part 2, Subpart G.[5] Section 2.790(b)(4) sets forth five factors for the Commission to consider when determining whether information at issue is "confidential or privileged commercial or financial information:"

> (I) whether the information has been held in confidence by its owner;
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> (ii) whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor;

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[4] 59 NRC 355.

[5] Effective February 13, 2004, the Commission renumbered section 2.790 as section 2.390, but did not modify its language. Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2219, 2254-56 (Jan. 14, 2004). The revised procedural rules do not, however, apply in the instant case.

> (iii) whether the information was transmitted to and received by the Commission in confidence;
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> (iv) whether the information is available in public sources;
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> (v) whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.[6]

Applicants seeking redaction must address these criteria with specificity.[7] If the Commission determines that any of the information is in fact "confidential commercial or financial information," then the Commission must determine "whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position."[8]

This agency has produced scant jurisprudence applying section 2.790 to commercial or financial information. But that regulatory section embodies the standards of Exemption 4[9] of the Freedom of Information Act (FOIA),[10] so we look for guidance to the plentiful federal case law on that exemption.[11]

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[6] 10 C.F.R. §§ 2.790(b)(4)(i)-(v).

[7] 10 C.F.R. § 2.790(b)(1)(iii).

[8] 10 C.F.R. § 2.790(b)(5).

[9] *See General Elec. Co. v. NRC*, 750 F.2d 1394, 1397 (7th Cir. 1984).

[10] 5 U.S.C. § 552(b)(4). "It is not the Commission's intent to permit a greater degree of withholding of documents from public disclosure under § 2.790 than would be permitted under the Freedom of Information Act." Final Rule, "Restructuring of Facility License Application Review and Hearing Process," 37 Fed. Reg. 15,127 (July 28, 1972).

[11] This agency has similarly looked for guidance to federal court decisions involving
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Under Exemption 4, the current generally-accepted legal definition of "confidential" is information whose disclosure is likely to (1) impair the government's future ability to obtain necessary information, or (2) impair other government interests such as compliance, program efficiency and effectiveness, and the fulfillment of an agency's statutory mandate, or (3) cause substantial harm to the competitive position of the person from whom the information was obtained.[12] PFS raises only the third prong, so we need not reach the issue of a disclosure's adverse effect on the government. The federal courts have interpreted the third prong to require a showing of (a) the existence of competition and (b) the likelihood of substantial competitive injury.[13]

Federal court decisions are, however, divided on the question as to what constitutes "competitive injury." One line of cases concludes that such injury can flow from either competitors or non-competitors (such as customers and suppliers).[14] A second line of cases

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[11](...continued)
FOIA Exemption 5. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-82,16 NRC 1144, 1163-64 (1982) (executive privilege). *See also* March 31st Order at 31 (considering two court decisions regarding Exemption 4 as "guidance").

[12] *See*, *e.g.*, *McDonnell Douglas Corp. v. National Aeronautics and Space Admin.*,180 F.3d 303, 305 (D.C. Cir. 1999), *reh'g en banc denied*, No. 98-5251 (D.C. Cir. Oct. 6, 1999); *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993), *approving on this ground but rev'g and vacating on other grounds* 830 F.2d 278, 286 (D.C. Cir. 1987); *9 to 5 Org. for Women Office Workers v. Board of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7-10 (1st Cir. 1983).

[13] *See*, *e.g.*, *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976).

[14] *See*, *e.g.*, *McDonnell Douglas Corp. v. National Aeronautics and Space Admin.*,180 F.3d at 306, 307; *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d at 687; *Continental Oil Co. v. Federal Power Commission*, 519 F.2d 31, 35 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). *See generally* Final Rule, "Critical Energy Infrastructure Information," Order No.
(continued...)

interprets "competitive injury" more narrowly, limiting the phrase's scope to injury directly caused by a competitor's use of the information.[15] The Board in its March 31st Memorandum and Order adopted the narrower interpretation. As explained in detail below, we find the broader interpretation to be closer to the heart of Exemption 4 and 10 C.F.R. § 2.790, and thus we adopt it.

III. DISCUSSION

A. Existence of Competitors

As noted above, PFS's claim of "competitive harm" depends on a showing that it has competitors for its services. Three years ago, in *Utah v. Department of the Interior,* a FOIA case involving (among other parties) PFS and Utah, the Tenth Circuit considered this very issue and found expressly that "actual competition [for PFS] exists."[16] The court pointed to a PFS affidavit maintaining that "the storage of spent nuclear fuel 'is a competitive business.'"[17] In our case, the Licensing Board relied upon the Tenth Circuit's *Utah* decision to find sufficient "competition" to justify PFS's proprietary claim.[18]

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[14](...continued)
630, 102 FERC P 61,190, Appendix B, 2003 WL 21436754 at *29 (FERC) ("a submitter may be able to show competitive harm where use of the information by someone other than a competitor could cause financial harm to the submitter"), *reh'g denied and opinion modified on other grounds*, Order No. 630-A, 104 FERC P 61,106, 2003 WL 21716351 (FERC 2003).

[15] *See CNA Financial*, 830 F.2d at 1152; *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983).

[16] 256 F.3d 967, 971 (10th Cir. 2001).

[17] *Id.* at 970.

[18] *See* March 31st Order, slip op. at 15-17.

Ordinarily, under principles of collateral estoppel, losing parties are not free to re-litigate already-decided questions in subsequent cases involving the same parties.[19] But Utah argues on the current appeal that PFS's competitive situation has changed since the Tenth Circuit decision. Utah maintains that it now is clear that PFS has no competitors, and therefore PFS cannot be said to suffer a "competitive harm to [its] competitive position" from disclosing the information at issue here.[20] Utah chiefly relies on our own recent statement in CLI-04-10 that "PFS ... has no competitors now or in the foreseeable future for private, away-from-reactor dry storage."[21]

Utah puts more weight on the quoted language than it can bear. Our comment on "away-from-reactor dry storage" amounted to *dicta* supporting our view that PFS seemingly faces a more favorable competitive environment than another company, Louisiana Energy Services, with an analogous financial plan that we had also approved. Our comment did not announce a formal fact finding, resting on affidavits or record evidence, of changed circumstances. Thus it does not override the preclusive force of the Tenth Circuit's holding in the *Utah* case on the precise question – whether PFS has competitors -- at stake here.

In any event, our statement in CLI-04-10 was quite limited. We mentioned "private, away-from-reactor dry storage" only. We said nothing about onsite storage at reactors. The

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[19] *See Private Fuel Storage, LLC* (ISFSI), LBP-02-20, 56 NRC 169, 181-84 (2002) (discussing authorities). *See also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 38 & n. 27 (1993). The collateral estoppel doctrine does not call for an inquiry into "the correctness of the prior decision." *See Private Fuel Storage*, LBP-02-20, 56 NRC at 182.

[20] *See*, *e.g.*, Utah's Reply to PFS's Supplemental Brief, dated July 16, 2004, at 1.

[21] Utah's Response to Applicant's Petition for Review, dated Feb. 2, 2004, at 7, quoting CLI-04-10, slip. op. at 12.

omission is significant, for even if, as we indicated in CLI-04-10, away-from reactor competitors are unlikely "now or in the foreseeable future," PFS faces actual (and potential) competition from numerous reactor licensees who are now using or are thinking about constructing their own onsite storage facilities.

Both Utah and the NRC Staff have long been aware of, and have repeatedly commented on, this particular source of competition.[22] The Staff's Final Environmental Impact Statement (2001) addressed -- seven times -- the issue of competition between PFS storage and onsite reactor storage.[23] And, prior to the filing of PFS's Petition for Review, Utah itself referred three times to this specific source of competition:

> PFS has an incentive to cut costs so as to retain existing customer business and to attract new business by offering fuel storage competitive with on-site dry storage.[24]
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> [i]f PFS is granted a license for this facility, the only potential competitors to PFS may be the PFS customers who already have on-site ISFSIs.[25]

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[22] For this reason, we reject Utah's argument that PFS is improperly raising this argument for the first time on appeal. Utah's Brief on Financial Information, dated June 30, 2004, at 7.

[23] *See* NUREG-1714, "Final Environmental Impact Statement: for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County Utah," Docket No. 72-22 (Dec. 2001), at hyphenated pages 8-3, 8-10, G-415, G-416, G-422, G-426.

[24] Utah's Petition for Review of Contentions Utah E / Confederated Tribes F (Financial Assurance) & Utah S (Decommissioning), dated Jan. 15, 2004, at 16 n.29.

[25] Utah's Response to Applicant's Justification for Withholding Portions of Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Relating to Remand from CLI-00-13), Partial Initial Decision (Contention Utah E/confederated Tribes F), and Partial Initial Decision (Contention Utah S) from Public Disclosure, dated July 14, 2003, at 6.

> [Referring to] the incentives PFS must offer customers if it is to be competitive with onsite storage.[26]

In short, treating onsite storage as a PFS "competitor" comes as no surprise. The record is replete with references to just that kind of competition.

Utah argues that the "onsite competition" argument comes too late. Utah points out that onsite storage was not the basis of the Board's decision on proprietary information, and was not argued by PFS until this appeal.[27] We reject Utah's timeliness complaint. As we explained above, the onsite competition point is hardly new to this litigation. It has come up repeatedly. Acting as an appellate body we are free to affirm a Board decision on any ground finding support in the record, whether previously relied on or not.[28]

B. Information regarding Castle Rock Settlement Agreement

The Board, in the Financial Assurance Order,[29] considered the issue of PFS's financial qualifications under 10 C.F.R. § 72.22 and, in that context, addressed the issue whether PFS had provided reasonable estimates of its construction and operating costs. Part of the Board's analysis of this cost issue concerned the costs stemming from PFS's settlement agreement with Castle Rock, a group of owners of land bordering on the PFS site. PFS had initially requested that the Board redact the information regarding the existence and terms of the settlement, but it

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[26] Utah's Response to Applicant's Petition for Review of Memorandum and Order Granting and Denying in Part Motion for Reconsideration and/or Clarification of Financial Qualifications Decisions at 6 n.12.

[27] Utah's Brief on Financial Information at 7.

[28] *See, e.g., Hertz v. Luzenac Amer., Inc.*, 320 F.3d 1014, 1017 (10th Cir. 2004); *Carney v. American University*, 151 F.3d 1090, 1096 (D.C. Cir. 1998).

[29] Financial Assurance Order at 86, 92-93.

later reduced the scope of its request to cover only the terms, *i.e.*, **xxxxxx**.[30] PFS had argued that public disclosure of **xxxxxxxxxxx.** The Board, in its March 31, 2004 order, declined PFS's request. The Board reasoned that, although disclosure of the settlement-related information might cause PFS "financial" harm, the harm would not be "competitive," and would therefore not satisfy the fifth factor set forth in 10 C.F.R. § 2.790(b)(4) -- "substantial harm to the competitive position of the owner of the information."

On appeal, PFS argues (among other things) that disclosure would generally undermine parties' reliance on the confidentiality of the terms of their settlements, and would thus contravene the Commission's policy of favoring settlements of adjudicatory proceedings.[31] *Amicus Curiae* Castle Rock supports this argument, emphasizing that the confidentiality of the terms and conditions of the settlement agreement was and continues to be "of the utmost importance"[32] to it and that it "would have been reluctant to settle absent" such confidential treatment.[33]

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[30] *See* page 14, *infra*.

[31] PFS's Petition for Review, dated April 15, 2004, at 6; PFS's Supplemental Brief, dated June 30, 2004, at 2-3, 4-6.

[32] Motion by Castle Rock for Leave to File an *Amicus Curiae* Brief, dated June 30, 2004, at 2. We grant Castle Rock's Motion.

[33] *See Amicus Curiae* Brief of Castle Rock, dated June 30, 2004, *passim*, and particularly 5-8; Affidavit and Declaration of Christopher F. Robinson [on behalf of Castle Rock], dated June 30, 2004, at 3.

According to Castle Rock, the settlement included **xxxxxxxxxx.**. This **xxxxxx** is contingent upon the licensing and operation of the proposed PFS facility. Neither the terms of the settlement nor the March 31st Order refer to this **xxxxxxxxxx**[34] **xxxxxxxxx**.

We agree with the conclusion of PFS and Castle Rock. Section 2.759 of our procedural regulations stresses the important role settlements play in our adjudicatory program:

> The Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or the entire proceeding. Therefore, to the extent it is not inconsistent with hearing requirements in section 189 of the [Atomic Energy] Act (42 U.S.C. [§] 2239), the fair and reasonable settlement of contested initial licensing proceedings is encouraged. It is expected that the presiding officer and all the parties to those proceedings will take appropriate steps to carry out this purpose.[35]

Likewise, our decisions have consistently expressed our support for settlements.[36] Were we to disclose to the public the proprietary information from the PFS-Castle Rock settlement, we would not only undermine one of the principal grounds of that settlement, but we would also discourage parties from settling their financial disputes in the future, for fear that we would likewise publicly disclose the proprietary information in their settlements. This would, in turn, hinder the fulfillment of our statutory mandate to protect the public health and safety.[37]

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[34] *See Amicus Curiae* Brief of Castle Rock at 3-4, 6-8. The NRC Staff supports Castle Rock's assertions of competitive harm. *See* NRC Staff's Brief in Reply to PFS, dated July 16, 2004, at 3.

[35] 10 C.F.R. § 2.759.

[36] *See*, *e.g.*, *Sequoyah Fuels Corp. and General Atomics* (Gore OK Site), CLI-97-13, 46 NRC 195, 205 (1997), and cited authority.

[37] *See generally 9 to 5 Org.*, 721 F.2d at 10; *Public Citizen Health Research Group v. NIH*, 209 F. Supp.2d 37, 53 (D.D.C. 2002); *Nadler v. FDIC*, 899 F. Supp. 158, 162, 163 (S.D.N.Y. 1995), *aff'd*, 92 F.3d 93 (2d Cir. 1996).

Although we do not today take a hard-and-fast position that we will *never* reveal the contents of a confidential settlement agreement, we believe the circumstances of this case justify redacting from Board orders the contents of the PFS-Castle Rock settlement. The importance of honoring the settling parties' expectations of confidentiality is particularly strong in this proceeding because *both* parties to the settlement oppose disclosure of its terms on grounds of potential financial harm.[38]

We disagree with Utah that FOIA allows us no discretion to withhold **xxxxxxxxxxxxx**.[39] Settlement documents fall within the bounds of Exemption 4,[40] and federal courts have repeatedly refused disclosure requests where, as with Castle Rock and PFS, the information's release will harm the negotiating position of a party in any future **xxxxxxxxxx**.[41] Indeed, in a case involving both PFS and Utah, the Tenth Circuit refused (under FOIA) to order PFS to disclose to Utah its lease arrangements with the Goshute Tribe on the ground, inter alia, that

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[38] The law does not require certainty of injury in these situations; possibility of injury is sufficient. *See*, *e.g.*, *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d at 1291.

[39] Utah's Reply to PFS's Supplemental Brief at 4.

[40] *M/A-COM Info. Sys. v. Department of Health and Human Serv.*, 656 F. Supp. 691, 692 (D.D.C. 1986) ("it is in the public interest to encourage settlement negotiations in matters of this kind and it would impair the ability of HHS to carry out its governmental duties if disclosure of this kind of material under FOIA were required"). *Cf. Goodyear Tire & Rubber Co. v. Chiles Power Supply*, 332 F.3d 976, 983 (6th Cir. 2003) (recognizing a "settlement negotiation privilege," albeit not in a FOIA context).

[41] *See*, *e.g.*, *Flathead Joint Bd. of Control v. Department of Interior*, 309 F. Supp.2d 1217, 1221, 1222 (D. Mont. 2004); *Starkey v. Department of Interior*, 238 F. Supp.2d 1188, 1195 (S.D. Cal. 2002).

disclosure might weaken both PFS's and the Tribe's future bargaining positions.[42] (As noted above, the Tenth Circuit also found that PFS faced competition.[43])

The purpose of FOIA -- and section 2.309 -- "is not fostered by disclosure of information about private citizens ... that reveals little or nothing about an agency's own conduct."[44] Whether under FOIA or otherwise, the government need only disclose private parties' information if it "informs citizens about what their government is up to."[45] The settlement terms at issue in this proceeding shed little or no light on the NRC's conduct or decision. So when we balance the public's need for this information against PFS's and Castle Rock's need to keep the information out of the public domain,[46] the balance strongly favors the latter interest.[47]

Before leaving this topic, we need to address briefly Utah's remaining three arguments. Utah first directs our attention to the fact that the existence of the Castle Rock settlement is already public knowledge.[48] Utah's point, while correct as to the settlement's *existence*, is irrelevant to the issue of whether to redact the settlement's *terms*. PFS's and Castle Rock's principal concerns are not about public knowledge of the settlement's existence but rather about

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[42] *Utah v. Department of Interior*, 256 F.3d at 970-71.

[43] *Id.*

[44] *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989); *McDonnell Douglas Corp. v. Department of the Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004).

[45] *McDonnell Douglas Corp. v. Department of the Air Force*, 375 F.3d at 1193 (internal quotation marks omitted).

[46] 10 C.F.R. § 2.790(b)(5).

[47] *See generally Utah v. Department of the Interior*, 256 F.3d at 971.

[48] Utah's Response to Applicant's Petition for Review at 3 n.4.

public knowledge of its **xxxxxx** terms.[49] In this regard, PFS points out that all of its current requests for redaction of references to the Castle Rock settlement relate solely to those terms.[50] Utah has not challenged PFS's statement.

Next, Utah points out that it seeks release of only **xxxxxxxx**, not the entire terms of the settlement.[51] The narrowness of the scope of Utah's disclosure request does not, in our view, determine whether we should disclose the **xxxxxxxx.** As discussed above, the public release of this **xxxxxxxx** could harm the future negotiating positions of the two parties to the settlement, undermine their joint expectation of confidential treatment, and weaken the confidence of future parties in the NRC's willingness to keep such settlement-related information confidential.

Finally, Utah contends that PFS has the option of keeping the Castle Rock information out of the public domain **xxxxxxx**, and that consequently PFS has failed to show competitive harm as required for redaction of information that the NRC requires an applicant to submit.[52] Again, we disagree. Under our regulations, the confidential treatment of settlement information does not turn on **xxxxxxx**.

For these reasons, we reverse the Board's rulings declining to redact from its orders information about the terms of the Castle Rock settlement.

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[49] *See*, *e.g.*, PFS's Petition for Review at 6 & n.15; PFS's Supplemental Brief at 2 n.7.

[50] *See* PFS's Supplemental Brief at 2-3 n.7. *See also* page 10, *supra*.

[51] Utah's Reply to PFS's Supplemental Brief at 4.

[52] Utah's Response to Applicant's Petition for Review at 9; Utah's Response to Applicant's Motion for Stay, dated April 20, 2004, at 6 n.14.

C. Information Regarding PFS's Model Service Agreement

Earlier in this proceeding, PFS had argued that the terms of its MSA provide reasonable assurance that PFS would have sufficient funds to build and operate its facility and meet the Commission's license conditions regarding financial assurance. The Board agreed,[53] relying in significant part on the fact that the MSA would pass all construction, operation and decommissioning costs along to PFS's customers.[54] The Board, in its January 5, 2004 order, declined to reconsider this conclusion.[55]

PFS then asked the Board to redact, for reasons of confidentiality, those portions of the Board's various MSA discussions that, according to PFS, revealed its intent to pass through 100 percent of its costs to its customers. PFS also argued that the Board's discussion of the Commission's decision in *Monticello* (where we had discussed an arguably analogous 100-percent cost passthrough arrangement)[56] would "strongly imply to a reader"[57] that PFS intended to adopt the same passthrough arrangement as in *Monticello*. PFS claimed that this revelation would provide its customers and vendors with unfair advantages over PFS in their negotiations with PFS, and would also harm PFS *vis - á - vis* any competitors who might seek to

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[53] Financial Assurance Order at 67, 101-02.

[54] MSA Order at 59-60.

[55] Memorandum and Order (Granting in Part and Denying in Part Motion for Reconsideration and/or Clarification of Financial Qualifications Decisions) (Jan. 5, 2004) ("Reconsideration Order"), *rev'd*, CLI-04-27, 60 NRC ___ (Oct. 7, 2004).

[56] *Northern States Power Co.* (Monticello Nuclear Generating Plant), CLI-00-14, 52 NRC 37 (2000), *reconsid'n denied*, CLI-00-19, 52 NRC 135 (2000).

[57] Applicant's Motion for Stay, dated April 13, 2004, at 3. *See also* Applicant's Supplemental Brief at 6-8.

enter the market and undercut PFS's prices for spent fuel storage.[58] The Board rejected this line of argument on the ground that its orders neither delved into the details of the MSA's cost passthrough terms nor suggested through its citations to *Monticello* that PFS was planning to use the same passthrough arrangement.[59]

On appeal, PFS acknowledges that, with a single exception, the Financial Assurance Order reveals no information that would cause PFS competitive financial harm.[60] However, according to PFS, the MSA Order and the Reconsideration Order do reveal PFS's intent to pass *all* its costs through to its customers. PFS asserts that this revelation stems from two features of those last two decisions: they discuss no funding mechanisms other than the MSA, and they also cite the Commission's *Monticello* decision dealing with 100-percent cost passthrough.[61]

As we noted above, federal courts have redacted commercial information under FOIA's Exemption 4 if the party seeking redaction can show both (a) the existence of competition and (b) the potential for competitive injury.[62] We require the same demonstration from parties who ask us to withhold purportedly "confidential or privileged commercial or financial information" pursuant to section 2.790. Although PFS has shown the existence of competition (*see* pages 7-10, 10, *supra*), we conclude for the reasons given below (*see* pages 27-28) that it has failed to

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[58] *See*, *e.g.*, PFS's Justification for Withholding Portions of the Memorandum and Order, dated July 3, 2004, at 2.

[59] March 31st Order at 31.

[60] PFS's Petition for Review at 4 n.11, 7-8 & n.16; PFS's Motion for Stay at 9, *as revised in* Clarification and Correction to Applicant's Motion for Stay, dated April 16, 2004, at 2.

[61] PFS's Petition for Review at 7-8.

[62] *See*, *e.g.*, *CNA Financial*, 830 F.2d at 1152; *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d at 679.

demonstrate the possibility of competitive injury from the public disclosure of PFS's 100-percent passthrough proposal. We therefore hold that citations to *Monticello* and information regarding PFS's 100-percent passthrough MSA should be publicly disclosed. At the same time, we hold that various specific aspects of PFS's financial arrangements are not suitable for disclosure and should be redacted.

1. Legal Definition of "Competitive Harm"

Utah asserts that injury suffered from suppliers and customers does not constitute "competitive harm" required under federal case law.[63] Utah acknowledges, however, that the federal courts are split as to "whether competitive harm must flow from use of information directly by competitors, or whether competitive harm can result from use of information by a business' customers, suppliers, etc., thereby damaging the position of the business *vis - á - vis* its competitors."[64] As noted at page 6, *supra*, there are two opposing lines of Exemption 4 decisions in which the federal courts (mainly the United States Court of Appeals for the District of Columbia Circuit) address this question.[65] Such case law, like Exemption 4 itself, provides us guidance, though it does not bind us in this area of law.[66]

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[63] Utah's Brief on Financial Information at 5-6 and n.10.

[64] *Id.* at 6 n.11. Utah asserts that this "competitive injury" issue becomes relevant only where an entity claiming confidentiality has already demonstrated "actual competition" -- something Utah claims that PFS does not have. *See id.* at 6. Given our finding above that PFS does have actual competition, we do not address Utah's assertion.

[65] The D.C. Circuit decisions carry particular weight regarding this issue because it oversees the United States District Court for the District of Columbia, which is the court of universal venue for FOIA cases. *See* 5 U.S.C. §552(a)(4)(B).

[66] *Shoreham*, LBP-82-82,16 NRC at 1163; *Wisconsin Elec. Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-42, 15 NRC 1307, 1316 (1982) ("Where there is a Commission regulation, duly promulgated, coexisting with other precedent in the general area,
(continued...)

A pair of District of Columbia Circuit decisions from the 1980s held that "competitive harm in the FOIA context ... is ... limited to harm flowing from the affirmative use of proprietary information *by competitors*."[67] But a 1999 case from the same Circuit appears incompatible with those earlier cases. In *McDonnell Douglas Corp. v. NASA*, the D.C. Circuit found in an Exemption 4 context that disclosure of government contract prices would harm the submitter of that information by permitting its "commercial customers to bargain down ('ratchet down') its prices more effectively."[68] In approving the rejection of a petition for rehearing *en banc*, Judge Silberman explained in a concurring opinion that, "other than in a monopoly situation[,] anything that undermines a supplier's relationship with its customers must necessarily aid its competitors."[69]

The result in *McDonnell Douglas* is consistent with the well-established rule that a company can demonstrate substantial harm to its competitive position without showing "*actual* competitive harm," *i.e.*, harm directly caused by disclosure of information to a company's

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[66](...continued)
the regulation is controlling"). *Compare* 10 C.F.R. § 2.790(a)(4) & (b)(4) *with* 10 C.F.R. § 9.17(a)(4) (the Commission's regulation actually implementing Exemption 4 of FOIA). The latter regulation was promulgated to implement FOIA, while the former was not. *Kansas Gas and Electric Co.* (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 415 (1976).

[67] *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d at 1291 n.30 (emphasis added). *Accord CNA Financial*, 830 F.2d at 1154 & n.158 (quoting *Public Citizen*).

[68] 180 F.3d at 306.

[69] United States Dep't of Justice, *Freedom of Information Act Guide & Privacy Act Overview* at 325 n.311 (May 2004), quoting *McDonnell Douglas Corp. v. NASA*, No. 98-5251, slip op. at 2 (D.C. Cir. Oct. 6, 1999) (Silberman, J., concurring in denial of reh'g *en banc*) .

competition.[70] Rather, all that is required under Exemption 4 is a showing that it faces both actual competition and a *likelihood* of substantial competitive injury.[71]

The D.C. Circuit is not the only court to conclude that "competitive harm" under Exemption 4 may come from sources other than direct competitors. The Tenth Circuit, in a case involving both PFS and Utah, has ruled that such injury may come from the use of the confidential information by "*suppliers*, *contractors*, labor organizations, creditors, and customers of PFS and the facility."[72] Analogously, the Second Circuit ruled that "[t]he fact that [the] harm would result from active hindrance by [an opposing citizens group] rather than directly by potential competitors does not affect the fairness considerations that underlie Exemption Four."[73] And our own Licensing Board took the following similar position in 1988: "substantial economic harm to the information's owner may be protected under Exemption 4 even where no competitive position is at risk.... Exemption 4 is not by its terms limited to considerations of competitive harm."[74]

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[70] *Gulf & W. Indus.*, 615 F.2d at 530 (emphasis added).

[71] *See*, *e.g.*, *id.*, 615 F.2d at 530; *Niagara Mohawk*, 169 F.3d at 19; *Frazee v. Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996); *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994); *Public Citizen Health Research Group v. FDA*, 704 F.2d at 1291; *Public Citizen Health Research Group v. NIH*, 209 F. Supp.2d at 46.

[72] *Utah*, 256 F.3d at 967, 970-71 (10th Cir. 2001) (emphases added). Utah attempts to distinguish the Tenth Circuit decision on the ground that it involved an *executed* lease while PFS's MSA contracts have yet to be negotiated. We disagree. The Tenth Circuit's ruling did not rely on the executed nature of the lease when determining whether it should be disclosed.

[73] *Nadler*, 92 F.3d at 97 (2d Cir. 1996), *aff'g* 899 F. Supp. 158, 163 (S.D.N.Y. 1995).

[74] *Public Serv. Co. of NH* (Seabrook Station, Units 1 and 2), LBP-88-8, 27 NRC 293, 299 (1988) (citation omitted).

2. Risk of Competitive Harm

Utah raises one general objection -- that PFS's evidentiary support of its claims of potential injury is too general to pass muster. We disagree. The affidavit and declarations from PFS's Chairman, Mr. John D. Parkyn, are as specific as the affidavit that the Tenth Circuit found sufficiently detailed in *Utah v. United States Dep't of the Interior*.[75]

We turn now to the question whether public release of certain *specific* categories of information from the evidentiary record and the decisions could result in a risk of competitive harm. Utah's challenges regarding redaction of evidentiary and decisional materials regarding competitive injury are largely the same, the Board responded to them in largely the same way, and the legal factors for determining whether to redact these two kinds of material are the same. Therefore, to the extent Utah's arguments concern information that appears in both evidentiary and decisional material, we treat them together.

Utah's lines of argument comprise a series of challenges to the Board's disclosure-related factual findings[76] -- an area in which we have traditionally deferred to the Board, and will reverse only if the findings are "clearly erroneous."[77] As we explained recently in *Tennessee Valley Authority*:

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[75] 256 F.3d 967, 971 (10th Cir. 2001). *Compare* the two affidavits (by Mr. Parkyn and Mr. Leon D. Bear) before the Tenth Circuit, appended to PFS's Reply to Utah's Objections, dated July 24, 2003, as Attachment D, *with* the affidavit and declarations of Mr. Parkyn, appended to Joint Filing of the Parties, dated July 3, 2003.

[76] *See* Utah's Petition for Review, dated April 15, 2004, at 2 ("The overarching concern raised below by Utah is for full disclosure of the Board's four substantive" orders).

[77] 10 C.F.R. § 2.786(b)(4)(i), *recodified at* 2.341(b)(4)(i), effective February 13, 2004 (Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2219, 2251 (Jan. 14, 2004)).

> We ordinarily defer to our licensing boards' fact findings, so long as they are not clearly erroneous. A clearly erroneous finding is one that is not even plausible in light of the record viewed in its entirety.... Although the Commission has the authority to reject or modify a licensing board's factual finding, it will not do so lightly. We will not overturn a hearing judge's findings simply because we might have reached a different result.[78]

The Board found that the release of four different categories of information appearing in both evidentiary and decisional material would impose on PFS specific risks of competitive harm. Those categories, which we address *seriatim*, are minimum capacity for the initial facility, bottom-line construction costs, categories of passthrough costs, and maximum onsite property insurance.

The Board concluded that release of the minimum capacity of the proposed PFS initial facility would result in competitive harm from potential competitors and customers.[79] According to the Board, not even Utah had suggested that PFS would suffer no injury from the revelation of this information.[80] On appeal, Utah neither contests this finding nor cites to any place in the hearing record where Utah makes such an argument.[81] We conclude, therefore, that the issue was not contested below, and that we do not need to reach it on appeal.

The Board next found that "disclosure of bottom line costs for each of PFS's three planned phases of construction would cause PFS substantial competitive harm from

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[78] *Tennessee Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 189 (2004) (footnotes, citations and internal quotation marks omitted).

[79] March 31st Order at 17.

[80] *Id.*

[81] *See* Utah's Brief on Financial Information at 11.

competitors and potential customers."[82] We accept the Board's conclusion that this cost information should not be released, though we disagree with one of the Board's two underlying justifications. As a matter of logic, we do not see how the revelation of these bottom line costs could harm PFS's negotiating position *vis - a - vis* potential customers. No potential customer could realistically be expected to agree to a "cost passthrough" agreement without knowing the amounts of those costs. Indeed, the MSA itself provides that customers may "reasonably request in writing information from PFS regarding the basis for and calculations of any invoiced amounts."[83] Consequently, PFS would have to reveal those costs when explaining the "cost passthrough" provisions of the MSA. To this extent, we disagree with the Board's finding.

But we still find that record evidence supports the Board's findings that a *prospective competito*r could use the estimates to determine the feasibility of constructing an ISFSI less expensively and hence undercut PFS's storage rates.[84] We affirm this portion of the Board's factual finding on grounds of deference and no clear error, and also on the additional ground that, as a matter of law, actual or potential competitive injury need not come from that particular competitor. It may come instead from prospective competitors who may be considering the construction of their own ISFSIs.[85] Any interest the public may have in this kind of cost information is easily outweighed by PFS's competitive interests. As the Board properly noted, Utah and the public have been given access to an "extensive amount of information, including

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[82] March 31st Order at 18.

[83] Model Agreement for Storage of Spent Fuel at 35, § 14.2.2, *attached to* Applicant's Motion for Summary Disposition, dated Dec. 4, 2000. *See also* Applicant's Submission of [original] Model Service Agreement, dated Sept. 29, 2000, at 31, § 14.2.2.

[84] March 31st Order at 18.

[85] See pp. 19-21, *supra*.

the imposed license conditions[,] ... the remaining unredacted portions of the evidentiary record[,] ...the capacity for each of the planned phases of construction [and, most important as to this particular issue,] the general methodologies and assumptions PFS relied upon in determining its cost estimates."[86]

The Board further found that "PFS would suffer competitive harm if competitors, vendors, suppliers and subcontractors learn which costs will be passed through to PFS customers," and that such categories of passthrough costs therefore constitute commercial or financial information protected under section 2.790(b)(3)(I).[87] The Board relied on a PFS affidavit stating that vendors, suppliers and contractors would "not be as competitive in the pricing of their own goods or services" if they learned of the relevant categories of passthrough costs.[88] The Board also relied on the affidavit's statement that "competitors could use such information to anticipate how PFS intends to structure its customer service agreements" and could "offer potential customers identical or more competitive terms."[89] We conclude that the Board's finding is supported by record evidence and not clearly erroneous, and further that PFS's interest outweighs that of the public.[90] We therefore affirm the Board's ruling.

We also find no clear error in the Board's fourth set of factual findings, concerning the maximum available onsite property insurance and PFS's response to future premium increases

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[86] March 31st Order at 22.

[87] *Id.* at 19-20.

[88] *Id.* at 19.

[89] *Id. See also* PFS's Motion for Stay at 6.

[90] March 31st Order at 22.

for that insurance coverage.[91] The Board's findings are supported by a PFS affidavit stating that competitors could use this information to either match or distinguish themselves from PFS's position when negotiating with potential customers.[92] We therefore find record support for, and no clear error in, the Board's finding of potential injury from competitors' knowledge of this information, and we defer to the Board's finding. We also agree with the Board that PFS's interest in confidentiality outweighs the countervailing public's interest.[93]

In addition to evidentiary and decisional discussions of the four topics discussed above, the Board also found that decisional discussions of four additional subjects should be exempt from disclosure: cost estimates, host facility cost information, current and obsolete funding plan information, and other MSA terms and conditions.

The Board declined to redact from its earlier orders information regarding the following cost estimates for a 4000-cask facility: total construction costs, total operating and maintenance costs over 40 years, total cask costs, and total canister costs.[94] The Board reasoned that PFS had not kept this information confidential, nor had PFS customarily held this kind of information

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[91] *Id.* at 20-21.

[92] *Id.* at 20.

[93] *Id.* at 22, 33-34. By contrast, the Board could find no record support for withholding information as to the course PFS would take if its intended insurance level cannot be maintained at the anticipated annual premium of **xxxxxxxxxxx** (*id.* at 20-21, 32). But as PFS does not challenge this ruling on appeal, we do not need to reach it. In any event, our own review of the record likewise reveals no such support. *See* PFS's Justification for Withholding, at unnumbered pages 4-5; PFS's Reply to Utah's Objections, dated July 24, 2003, at 9.

[94] March 31st Order at 26-27.

in confidence, nor was this information unavailable from public sources.[95] The record supports the Board's findings. Even though this kind of information might well have otherwise qualified for confidential treatment, we agree with the Board that PFS's own actions and practice (publishing this or similar information on its website or newsletters) render redaction inappropriate here under the five-factor test of section 2.790(b)(4).

Next, the Board agreed to redact certain host-facility cost information from its prior orders. It ruled that PFS's host payments to the Skull Valley Band could, if released, be used against it in negotiations for service contracts and in the competition for customers. Unlike the 4000-cask facility costs discussed immediately above, information about PFS's host payments to the Skull Valley Band has never entered the public domain.[96] We concur in the Board's decision to redact this information, and also its conclusion that PFS's interest in confidentiality outweighs the public's interest in disclosure.

By contrast, the Board declined to redact certain calculations by Utah's expert indicating PFS's underpayment of its host payments to Tooele County. The Board could find no evidentiary references to, or justifications for, PFS's redaction request.[97] We might have approved a redaction of this information had PFS provided a proper basis in the record below (as it did provide regarding its information on host-facility payments to the Skull Valley Band). Nonetheless, given the absence of such record support, we must concur with the Board's finding.

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[95] *Id.* at 26-27.

[96] *Id.* at 27.

[97] *Id.* at 28.

The Board further found, regarding the current funding plan for the PFS facility, that PFS would suffer competitive harm if vendors, suppliers and subcontractors learned of PFS's intention, under the MSA, to **xxxxxxxxx** pass all its operating and maintenance costs along to, its customers.[98] PFS asserts that vendors', suppliers' or contractors' knowledge of the MSA's passthrough provision could easily result in their raising their prices, to PFS's disadvantage.[99] Although Utah raises contrary arguments specific to *individual* vendors and subcontractors,[100] we can resolve this issue without getting down to that level of detail.[101] Logic suggests to us that vendors and subcontractors will seek the highest prices they can get, *regardless* of the nature of the purchaser's or contractor's funding arrangements. Vendors presumably would assume that PFS intends to pass its costs on to its customers. It is not self-evident that revealing this aspect of PFS's plan would compromise PFS's commercial interests or bargaining position.

In any event, neither the Board nor PFS has offered a persuasive explanation as to how public knowledge of the cost-passthrough nature of PFS's funding plan would somehow place

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[98] *Id.* at 31.

[99] *See*, *e.g.*, PFS's Reply Brief, dated July 16, 2004, at 3. As noted *supra* at page 16, PFS makes a related argument regarding references to our *Monticello* decision.

[100] *See*, *e.g.*, Utah's Petition for Review, dated April 15, 2004, at 6-8, (regarding rail carriers and cask vendors); Utah's Reply to PFS's Petition for Review, dated April 26, 2004, at 7 n.16 (regarding same).

[101] We, like the federal courts, need not engage in a sophisticated economic analysis of the substantial competitive harm ... that might result from disclosure. *GC Micro Corp.*, 33 F.3d at 1115. *Accord Utah*, 256 F.3d at 970; *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d at 1291. *See generally General Elec. Co. v. NRC*, 750 F.2d at 1403 (a proceeding on a request for information is not required to be as elaborate as a licensing or other formal proceeding"). *Cf. id.* (an NRC licensee need not make its case of substantial competitive harm with anything like the rigor that would be demanded of a plaintiff in an antitrust suit").

PFS in a more disadvantageous position *vis - á - vis* its vendors, suppliers and subcontractors than PFS would otherwise have been placed. Conclusory assertions in PFS's declarations and affidavits do not suffice. We therefore reverse the Board's refusal to release any discussion of PFS's intent to use a 100-percent cost-passthrough financing arrangement.[102]

We do not, however, reach a similar conclusion regarding PFS's earlier, now-abandoned funding plan (which is premised on a financial arrangement different from the 100-percent cost passthrough arrangement that supports PFS's current plan). Utah asserts that out-of-date information regarding this earlier plan should, due to its obsolescence, no longer be protected.[103] But even out-of-date financial information could arguably give competitors, vendors, suppliers and subcontractors useful information that they would use to PFS's disadvantage in future negotiations.[104] Conversely, such information will be of no use to the public in understanding whether PFS's *entirely different* funding plan satisfies our "financial assurance" requirements. The balance between these interests strongly favors those of PFS. We therefore affirm the Board's refusal to release PFS's older funding plan.[105]

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[102] March 31st Order at 31. For the same reasons, we affirm the Board's decision to release the various references in its orders to our *Monticello* decision (*id.* at 29-31).

[103] Utah's Petition for Review, dated April 15, 2004, at 10 & n.22. The out-of-date financial information was associated with a funding plan on which PFS was relying prior to its production of the current MSA cost-passthrough plan on Sept. 29, 2000. *See* Utah's Response to PFS's Petition for Review at 3.

[104] *See*, *e.g.*, *Timken Co. v. U.S. Customs Serv.*, 531 F. Supp. 194, 200-01 (D.D.C. 1981).

[105] *See* Utah's Petition for Review, dated April 15, 2004, at 10 n.22, citing Financial Assurance Order ¶¶ 3.46, 3.47, 3.72, 3.78, 3.81, 4.49, & March 31st Order, App. P, at 2-3, 9-10, 11-12 (in turn referring to MSA Order at 11, 12, 46-47, 61).

Finally, the Board found that PFS could suffer competitive harm from the release of the terms and conditions of its MSA other than the terms regarding **xxxxxxx** passthrough costs.[106] These "other" terms concern such matters as the service agreement execution / commitment fees,[107] the per Kg payments for Phase I of the project,[108] **xxxxxxx**,[109] and the amount of cash on hand prior to receiving spent fuel.[110] In support of its redaction ruling, the Board cited PFS's arguments that competitors and potential customers would have a significant competitive advantage during negotiations, and that potential competitors would likewise possess advantageous information.[111] For the reasons set forth above at page 23, we disagree with the "potential customers" portion of this finding (customers perforce will know the terms of the MSAs), but we uphold the "competitor" portion.

3. Balancing of Interests

We have conducted, *supra*, a balancing test for each kind of information that initially qualified as "confidential" under section 2.790(b)(4). We nonetheless believe further discussion of the balancing test is appropriate -- given the general nature of Utah's "balancing" argument, and particularly given the absence of prior Commission guidance on this topic.

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[106] March 31st Order at 33. On July 3, 2003, PFS filed with the Board a copy of the MSA Order on which PFS had flagged with the signal "***[6]***" all passages containing these "other" terms.

[107] *See*, *e.g.*, MSA Order at 13, 15, 20, 38.

[108] *See*, *e.g.*, *id.* at 17, 19, 30, 35, 41.

[109] *See*, *e.g.*, *id.* at 45-46.

[110] *See*, *e.g.*, *id.* at 28.

[111] March 31st Order at 33.

Once we have determined that much of a party's financial information is in fact proprietary, our regulations call on us to consider "whether the right of the public to be fully apprised as to the basis for and the effects of the proposed action outweighs the demonstrated concern for protection of a competitive position."[112] Utah argues generally that all the Board's redactions (as well as PFS's proposed additional redactions) would leave the public blind as to PFS's demonstrated compliance with 10 C.F.R. § 72.22(e) (financial qualifications) and the Board's and Commission's responses to Utah's substantive arguments that PFS is financially unqualified to own and operate the proposed ISFSI.[113] This result, according to Utah, undercuts its ability to represent its citizens and silences any public monitoring of "NRC's compliance with its regulations."[114]

We have stated that "[t]he public interest to be weighed in this balance has been narrowly defined as an interest in determining the bases for and results of agency action (*i.e.*, determining what the government is up to), and does not include incidental benefits from disclosure that may be enjoyed by members of the public."[115] Utah's general argument is essentially a restatement of this ruling. We conclude that, as a general matter, the balance favors withholding proprietary information regarding the kinds of financial issues discussed

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[112] 10 C.F.R. § 2.790(b)(5).

[113] Utah's Brief on Financial Information at 12-13.

[114] *Id.* at 13. *See also* Utah's Response to PFS's Motion for Stay at 6 ("misinformation remains in the public domain" and "the State will be harmed to the extent it must remain mute to PFS's public statements").

[115] Final Rule, "Availability of Official Records," 68 Fed. Reg. 18,836, 18,837 (April 17, 2003) (internal quotation marks omitted). Likewise, under FOIA case law, the first of these factors is *the only* public interest that may be weighed in the balance. *Public Citizen Health Research Group v. Food & Drug Admin.*, 185 F.3d 898, 904 (D.C. Cir. 1999); *Gilmore v. United States Dep't of Energy*, 4 F. Supp.2d 912, 922 (N.D. Cal. 1998).

above. Today, we have ruled consistent with this principle, with exceptions as specifically noted *supra*. During the half century in which we have been exercising this balancing test,[116] our weighing has been and continues to be informed by the "strong legislative policy against disclosure of proprietary information."[117] We also give considerable weight to the Staff's pro-redaction position which, in this proceeding, largely tracks that of PFS.[118]

It is important for nuclear industry participants to feel free to innovate (as PFS is doing in its ISFSI project), with no fear that the proprietary data associated with their innovations will casually be released to the public.[119] Indeed, Congress's purpose in enacting Section 103(b)(3) of the Atomic Energy Act[120] was "to protect the property right, the commercial right, which a

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[116] *Westinghouse Elec. Corp. v. NRC*, 555 F.2d 82, 87, 88 (3rd Cir. 1977).

[117] *Id.*, 555 F.2d at 87, 90-91. *See also id.* at 92 (referring to the "longstanding congressional policy which disfavors disclosure of proprietary information"); *Point Beach*, LBP-82-42, 15 NRC at 1315.

[118] See *Northern States Power Co.* (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390, 399, *aff'd*, 4 AEC 409 (no CLI number) (Commission 1970); *Point Beach*, LBP-82-42, 15 NRC at 1319.

[119] *See generally Westinghouse Elec.*, 555 F.2d 82; *Point Beach*, LBP-82-42, 15 NRC 1307 (1982).

[120] This section (42 U.S.C. § 2133(b)(3)) provides that

> The Commission shall issue ... licenses ... to persons applying therefor ... who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public.

licensee as a developer of a new procedure, new idea, should properly have."[121] Finally, we observe that a great deal of safety- and environmental-related information from the record is already in the public domain. We believe that public release of the additional proprietary financial information we are withholding here would add little to the public's understanding as to the overall safety of the PFS facility -- particularly given that the financial information is of only derivative significance to environmental and safety issues.[122]

In short, even with the redaction of the additional material as required by this order, we would still concur in the Board assessment that Utah's position

> fails to give sufficient weight to the extensive amount of information that will be made available to the public, including the imposed license conditions and remaining unredacted portions of the evidentiary record. PFS has agreed to disclose the capacity for each of the planned phases of construction, which gives the public a fairly precise idea of the magnitude of the proposed facility. In addition the public record will include the general methodologies and assumptions PFS relied upon in determining its cost estimates. The redacted record thus will provide the public with sufficient balanced information to know the basis for our decision.[123]

C. Additional Requests for Redaction

PFS asserts that the five pieces of additional information for which it now, for the first time, seeks proprietary treatment are similar to proprietary information for which it has already sought redaction. PFS explains that it had inadvertently overlooked the additional information

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[121] *General Elec. Co. v. NRC*, 750 F.2d at 1401, quoting Hearings on S. 3323 and H.R. 8862 to Amend the Atomic Energy Act of 1946 Before the Jt. Comm. on Atomic Energy, 83rd Cong., 2nd Sess. 925 (1954) (remarks of Congressman Cole, the committee's chairman).

[122] *See* Final Rule, "Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Review and Hearings for Nuclear Power Plants," 49 Fed. Reg. 35,747, 35,749 (Sept. 12, 1984); *Public Serv. Co. of NH* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 236 n.8, 244 (1989); *Louisiana Energy Serv.* (Claiborne Enrichment Center) CLI-97-15, 46 NRC 294, 306, 308 (1997).

[123] March 31st Order at 22.

on **xxxxxxx** and passthrough costs until preparing its instant petition for review. PFS directs our attention to the large volume of material it needed to review and also to its good faith effort to apply the redaction criteria narrowly to that material.[124]

Before we reach the merits of PFS's request for additional redactions, we must first consider the procedural question whether PFS made this request before the proper forum. PFS acknowledges that, ordinarily, it would raise such a supplemental request initially with the Board rather than with us. However, given that the Commission currently has before it numerous other related issues, PFS asserts that administrative efficiency justifies our consideration of PFS's supplemental request. We agree, and will consider PFS's request.[125]

For this agency's adjudicatory system to work as designed, the parties must follow the Commission's procedural rules. One of those rules provides that "[a] petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer."[126] Of the five pieces of information at issue, PFS asked the Board to provide protected status for only one, regarding cost categories.[127] The Board did not rule on this request, but we conclude that the Board's rationale for approving the redaction of other cost category information (which we affirm today at 24, *supra*) is equally applicable to this similar piece of information.

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[124] Applicant's Supplemental Brief at 9-10.

[125] *Public Serv. Co. of NH* (Seabrook Station, Units 1 and 2), ALAB-939, 32 NRC 165, 167 n.3 (1990). *See generally Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 101 (1983).

[126] 10 C.F.R. § 2.786(b)(5), *recodified at* 2.341(b)(5), effective February 13, 2004 (Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2219, 2251 (Jan. 14, 2004)).

[127] *See* Staff's Response to Applicant's Petition for Review, dated April 26, 2004, at 9 n.17.

As for the remaining four pieces of information, PFS has shown no good cause for failing to seek the Board's protection. Hence, we do not order this redaction. PFS's arguments (large volume of material, narrow application of redaction criteria) are so broad as to justify the late filing of redaction requests in just about any NRC adjudication involving large numbers of documents. For reasons of judicial efficiency, we decline to open that Pandora's Box. We find, therefore, that PFS has waived the redaction issue as to those four pieces of information.

D. Information contained in CLI-04-10 and CLI-04-27

On March 24, 2004, the Commission issued CLI-04-10 (as-yet-unpublished) granting PFS's petition for review of the Board's January 5th order and denying Utah's petition for review of portions of the same order as well as of two May 27, 2003 Board orders (the Financial Assurance Order and the Decommissioning Order). The issues on which we granted review (and sought appellate briefs) were whether PFS must have service contracts in place to cover operating and maintenance costs for a specific volume of spent fuel (1000 casks) prior to beginning operations and, if so, whether those contracts must be in a specific dollar amount in order to satisfy License Condition 17-2 (also cited as LC-2) approved in *PFS*, CLI-00-13. Because our discussion in CLI-04-10 regarding PFS's financial plan contained proprietary information, we gave the parties the opportunity to designate appropriate passages for redaction.

In response, PFS submitted proposed redactions.[128] Utah then objected to PFS's proposals on the grounds that the redactions related to published NRC decisional material -- the *Monticello* decision -- and destroyed the structure, accuracy, substance, and context of evolving

[128] Applicant's Designation of Proposed Proprietary Redactions to CLI-04-10, dated April 13, 2004.

agency precedent on financial assurance case law. Utah contended that PFS should not be allowed to rely on *Monticello* to support the "cost-plus" (*i.e.*, 100-percent cost passthrough, plus profit) basis of its license application, yet to seek simultaneously the redaction of references to *Monticello*-based "cost-plus" arguments in CLI-04-10. Also, according to Utah, CLI-04-10 may have generic implications for other proceedings dealing with financial qualifications issues. Utah grounds its legal arguments in 10 C.F.R. § 2.790 and FOIA's Exemption 4, discussed *supra*.[129]

We have already decided, *supra*, not to redact the Board Orders' citations to *Monticello*. Those rulings control as to CLI-04-10 as well. Also, we recently issued CLI-04-27 (addressing the merits of the parties "financial assurance" arguments) -- but after the parties had filed their appellate briefs regarding redaction. We nonetheless apply our rulings today to CLI-04-27, for the logic of today's rulings applies as much to CLI-04-27 as to CLI-04-10.

E. Future "Redaction" Proceedings

We issue the following instructions to PFS and the Board regarding redactions to the Board's five orders of May 27, 2003, January 5, 2004, and March 31, 2004, and also any briefs or evidentiary material in the record the disclosure of which has been contested in this appellate portion of the instant proceeding. PFS shall, within **60** days, provide the Board with redacted versions consistent with the rulings in the instant order.[130] We consider the Board better

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[129] Utah's Response to Applicant's Proposed Redactions to CLI-04-10, dated April 20, 2004.

[130] *See generally Point Beach*, LBP-82-42, 15 NRC at 1333 ("We shall call on Westinghouse to identify the text passages containing ... proprietary details and to delete only those details"); *Wisconsin Elec. Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-62, 14 NRC 1747, 1765 (1981) (after ordering the public release of certain information, the Board stated that "[w]e consider it appropriate to direct Westinghouse to submit to us a new (continued...)

positioned than we are to make this initial review of PFS's proposed redactions of Board material -- given the factual nature of the redaction issues,[131] the Board's considerably greater familiarity with the adjudicatory record, and the Board's own authorship of the five orders.[132]

As soon as possible after receiving PFS's proposed redactions, the Board shall review the redacted versions of those documents to confirm their consistency with the rulings in the instant order. If the Board is satisfied, it shall issue a Notice authorizing the Commission's Office of the Secretary (SECY) to release such versions to the public immediately. If, however, the Board is not satisfied, then it shall issue an Order setting forth its modifications to PFS's proposed redactions, and shall attach what it considers to be appropriately redacted versions of the documents at issue. The parties may file petitions for review of such a Notice or Order within **15** days of its service. The filing of a petition will automatically stay the public release of the documents at issue in that petition, pending a Commission ruling. If no petitions are filed within the **15**-day period, SECY shall immediately release to the public the Board's redacted versions of the documents.[133]

We likewise instruct PFS to provide us within **30** days with redacted versions of the instant order, CLI-04-10, and CLI-04-27, consistent with the rulings in the instant order. If we

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[130](...continued)
non-proprietary version of its filing which conforms to this ruling"); *McCurdy v. Wedgewood Capital Mgmt. Co.*, 1998 WL 964185 (E.D. Pa. Nov. 16, 1998) ("because both parties suggest that the Court review any contested documents *in camera*, ... [d]efendant will be ordered to produce one set of the "redacted documents" ... in our chambers ... for *in camera* inspection").

[131] *See generally Point Beach*, LBP-82-42, 15 NRC at 1318, 1330.

[132] *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), CLI-00-25, 52 NRC 355, 356 (2000).

[133] This procedural approach is similar to the one taken by the Licensing Board in *Point Beach*, LBP-82-42, 15 NRC at 1337-38.

are satisfied, we shall issue a Notice authorizing SECY to release such versions to the public immediately. If, however, we are not satisfied, then we shall issue an order setting forth our modifications to PFS's proposed redactions, and we shall attach what we consider to be appropriately redacted versions of the three Commission orders. SECY shall then immediately release those versions of the three orders to the public.

ORDER

(1) The Commission *affirms in part and reverses in part* the March 31st order's rulings regarding disclosure of the information from our *Monticello* decision, PFS's MSA, and PFS's settlement with Castle Rock.

(2) The Commission further *directs* the Board and parties to follow the procedures set forth in Section E of the instant Memorandum and Order.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook,
Secretary of the Commission

Dated at Rockville, MD
this 5th day January, 2005